SUBJECT INDEX

PAGE

Opinions below 2

Jurisdiction 2

Questions presented 2

The statutes involved 3

Statement 5

1. The beginning of the removal of Section 23 from public lands is found in the Act of 1864, although the grant therein failed because of Northern Pacific's financial inability to construct the road under the conditions of the Act of 1864 6

2. The terms and conditions of the Joint Resolution of 1870 were accepted by Northern Pacific, the road was constructed with the proceeds from its bonds secured by mortgage, and the right to Section 23 and other granted lands was earned 8

3. Northern Pacific selected Section 23 pursuant to both the Act of 1864 and the Joint Resolution of 1870 and patent thereon was issued expressly stating that it was pursuant to both Congressional Acts 9

4. Northern Pacific contracted to sell Section 23 to petitioner's predecessor, MaBelle Cobb, an actual settler, as required by the proviso of the Joint Resolution of 1870, but reserved the minerals in derogation thereof 11

5. Petitioner's action here under review was timely commenced, in a court of proper jurisdiction, and under appropriate allegations 13

PAGE

Reasons for granting the writ 15

1. The decision of the court below lies athwart the Congressional intent that public lands and their values, granted solely in aid of railroad construction, find their ultimate unencumbered disposition to the public at the stipulated maximum return of $2.50 per acre to Northern Pacific 15

   (a) The Joint Resolution of 1870 was in its very essenence necessarily a regrant, and as such, applicable in all of its terms and provisions to all of the then unearned lands granted to Northern Pacific under it and the Act of 1864 15

   (b) The proviso being fully applicable to all granted lands, the mineral reservation in conflict therewith on Section 23 is void 20

2. The opinion of this court in United States v. Northern Pacific R. Co., brought pursuant to Congressional Act, serves to support this petition 22

3. The law of estoppel in private grant, relied upon by the Court of Appeal, is without application where the origin of title is Congressional Act; neither does the law of estoppel properly apply here, where judgment was made summarily 28

Conclusion 30

Appendices:

Appendix A. Opinion of the United States Court of Appeals ..... App. p. 1

Appendix B. Portions of the Granting Act of 1864 ..... App. p. 19

Appendix C. Area within the State of Montana from which were drawn public lands in aid of the construction of the railroad and telegraph lines of Northern Pacific Railroad Company ..... App. p. 27

TABLE OF AUTHORITIES CITED

Cases

PAGE

Great Northern R. Co. v. United States, 315 U. S. 262 17

Oregon and California R. Co. v. United States, 238 U. S. 393 ..... 21, 22, 29

Oregon and California R. Co. v. United States, 243 U. S. 549, 61 L. Ed. 890 ..... 20, 21, 22

St. Paul and Pacific R. Co. v. Northern Pacific R. Co., 139 U. S. 1 ..... 7, 15

United States v. Northern Pacific R. Co., 41 Fed. Supp. 273 27

United States v. Northern Pacific R. Co., 311 U. S. 317 ..... 8, 9, 17, 23, 24, 25, 26, 27, 28

United States v. Union Pacific R. Co. (decided April 8, 1957, U. S. Supreme Ct.) 30

Valier Company v. State, 123 Mont. 329, 215 P. 2d 966, cert. den. 340 U. S. 827 29

Statutes

Act of July 2, 1864 (13 Stat. at L. 365, Chap. 217):

Sec. 3 3

Sec. 6 16

Sec. 10 4

Sec. 20 4

Act of May 7, 1866 (14 Stat. at L. 355) 8

Act of July 1, 1868 (15 Stat. at L. 255) 8

Act of March 1, 1869 (15 Stat. at L. 346) 8

Act of April 10, 1869 (16 Stat. at L. 57) 8

Act of June 25, 1929 (46 Stat. at L. 41, Chap. 41) 9

Act of May 22, 1936 (49 Stat. at L. 1369, Chap. 444) 22

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 28, Sec. 1332 14

MISCELLANEOUS PAGE

12 American Jurisprudence, p. 769 29
Congressional Globe, Feb. 8, 1870, p. 1097 (Senate) 26
Congressional Globe, Feb. 28, pp. 1584-1586 (Senate) 26
Congressional Globe, March 2, pp. 1624-1628 (Senate) 26
Congressional Globe, Apr. 7, pp. 2480-2486, 2491-2495 (Senate) 26
Congressional Globe, Apr. 9, pp. 2539-2547 (Senate) 26
Congressional Globe, Apr. 11, pp. 2569-2584 (Senate) 26
Congressional Globe, Apr. 20, pp. 2833-2848 (Senate) 26
Congressional Globe, Apr. 21, pp. 2867-2869 (Senate) 26
Congressional Globe, May 5, pp. 3263-3271 (House) 26
Congressional Globe, May 10, pp. 3343-3348 (House) 26
Congressional Globe, May 11, pp. 3365-3368 (House) 26
Congressional Globe, May 25, pp. 3786-3798 (House) 26
Congressional Globe, May 26, pp. 3850-3853 (House) 26
70 Congressional Record, March 2, 1929, Part 5, pp. 5118-5122, 70th Cong., 2d Sess. 19
Joint Resolution of May 31, 1870 (67 Stat. at L. 378) 2, 3, 4, 5, 7, 8, 9, 10, 11, 15, 16 17, 18, 19, 20, 22, 24, 25, 26, 27, 31
Resolution of June 5, 1924 (43 Stat. at L. 461) 19
Webster's New International Dictionary, Unabridged (2d Ed., 1945) 24

IN THE

Supreme Court of the United States

October Term, 1956

No. .....

THEODORE B. RUSSELL,

Petitioner,

vs.

THE TEXAS COMPANY, a corporation, FREDERICK T. MANNING DRILLING COMPANY, a corporation, and THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Petitioner, Theodore B. Russell, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above cause on November 24, 1956. The Court of Appeals affirmed the Judgment entered by the United States District Court for the District of Montana, which was made on Respondents' motions for Summary Judgment, and decided that the mineral estate (valued by Petitioner at in excess of one million dollars) on land owned by Petitioner was vested in Respondents.

Opinions Below.

The District Court prepared no separate opinion. Its Judgments, Partial Summary Judgment entered December 4, 1953, and Final Judgment entered October 13, 1955, are contained in the record printed for use of the court below, nine additional copies of which are filed herein for the use of this Court [R. 69-73, 126-1929]. In connection with its Final Judgment, the District Court filed a Memorandum [R. 120-126] which is not relevant to this Petition for Certiorari, and filed Findings of Fact and Conclusions of Law [R. 110-120], certain of which are relevant to this Petition [R. 111-113, 118-119].

The opinion of the Court of Appeals is not yet reported, and appears as Appendix A hereto.

Jurisdiction.

The Judgment of the Court of Appeals was entered November 24, 1956 [R. 271, Appx. A, p. 18]. Petition for Rehearing was filed within time, and on January 21, 1957, the Court of Appeals denied the Petition for Rehearing (Appx. A, p. 18). Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1). Order of this Court was made April 15, 1957, extending time for filing the Petition to and including May 20, 1957.

Questions Presented.

1. Whether the *Proviso* of the Joint Resolution of May 31, 1870[1] requiring, on the conditions specified, that all lands thereby granted to a railroad in aid of construction shall become subject to settlement and pre-emption at a price not exceeding $2.50 per acre, is applicable to the land here involved?

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[1]Resolution 67, Stat. at L. 378.

2. Whether, the *Proviso* of the Joint Resolution of 1870 having been determined to be applicable, a reservation of mineral rights by Respondent, Northern Pacific Railway Company,[2] in its conveyance to an actual settler constitutes such a derogation of the *Proviso* as to invalidate the mineral reservation?

The Statutes Involved.

Inasmuch as the issues presented are largely statutory, and based upon the Congressional intent, we here set out provisions having particular relevance, and set forth in Appendix B their fuller expression.

1. *The Act of July 2, 1864*[3] *incorporated Northern Pacific, authorized its construction of a railroad from Lake Superior to Puget Sound, with a branch line via the Columbia River to Portland, Oregon, conditionally granted certain public land in aid thereof, subject to prohibitions against encumbrance and with reservation of Congressional power to amend or repeal the Act.*

Section 3 of said Act of 1864 provides, in part:

> *"And be it further enacted,* That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, muni-

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[2]In this Petition we will not endeavor to distinguish between Northern Pacific Railroad Company, the original corporation, and its successor, Northern Pacific Railway Company, the Respondent herein, except where such distinction appears material; we will refer to the railroad companies as "Northern Pacific" and will refer to the Respondent, The Texas Company, by its full name. Defendant, Frederick T. Manning Drilling Company, a corporation, has been dismissed from the action by stipulation of the parties [R. 109].

[3]13 U. S. Stat. at L. 365, Chap. 217.

tions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, . . ."

Section 10 of said Act provides, in part:

". . . and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States."

Section 20 of said Act provides:

"And be it further enacted, That the better to accomplish the object of this act, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this Act."

2. *The Joint Resolution of 1870 authorized Northern Pacific to issue mortgage bonds for construction, authorized change of the main line as well as a new route for the branch line, affirmed the land grant therefor, and adopted a Proviso subjecting granted lands to settlement and pre-emption and prescribing certain limitations on foreclosure remedies.*

The Resolution of 1870 provides, in part, as follows:

". . . That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid

in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, . . . also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; . . . *Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre;*[4] . . ."

Statement.

The particular parcel of land in issue is Section 23, Township 17 North, Range 53 East, M. P. M., Dawson County, Montana. Section 23 lies within twenty miles of the road and is thus characterized as "place lands" as distinguished from "lieu lands" or "indemnity lands" which Northern Pacific was entitled to select when, for reasons described in the statutes, the lands within the place or "primary" limits were unavailable to it.

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[4]The emphasis upon this part of the *Proviso* we have added, as it is the hinge upon which this cause turns. Petitioner contends that the *Proviso* applies to all lands granted to Northern Pacific and not earned at the date of adoption of the Joint Resolution of 1870; whereas, Respondents would have the *Proviso* limited in its application to the land grant made by the Joint Resolution of 1870 for the branch line authorized thereby across the Cascade Mountains to Puget Sound.

The magnitude of the Northern Pacific land grants in Montana are graphically portrayed by the plat appearing as Appendix C. The place and indemnity belts for the present states of North Dakota, Idaho, Washington and Oregon are fully analogous, and the grants for the then states of Wisconsin and Minnesota differ only in that the alternate sections of the "place lands" extend over ten miles on each side of the road, rather than the twenty miles applicable to the territories. The final adjudication of this case will likely resolve the mineral ownership of land grant parcels disposed of by Northern Pacific throughout its vast domain in cases where the disposition took place more than five years after completion of the road. Inherent in the adjudication is the fulfillment or permanent nonfulfillment of Congressional intentions as to eventual devolvement upon the public of granted lands and their values. Hence, we trace the history of Section 23, and in so doing, the history of every parcel similarly situated.

1. The Beginning of the Removal of Section 23 From Public Lands Is Found in the Act of 1864, Although the Grant Therein Failed Because of Northern Pacific's Financial Inability to Construct the Road Under the Conditions of the Act of 1864.

This first Act in the chain of title of Section 23, that of July 2, 1864, proposed the financing of the construction of a railroad through the Northwest, found by Congress to be a public necessity, by the sale of stock to the general public by a federally chartered corporation, in aid whereof Northern Pacific was granted every alternate section of

public land, not mineral, to the amount of twenty sections per mile through territories[5] and ten sections per mile through states, with certain selection rights in lieu of the grant in the event mineral character, prior disposition, or other matters prevented the operative effect of the grant (Secs. 3 and 10). Northern Pacific's entitlement to patent was conditioned upon favorable report as to each twenty-five miles of line made ready for service (Sec. 4); thus it was unable to convey its right to granted lands until such time,[6] and it was prohibited from creating any mortgage or lien without consent of Congress (Sec. 10). On its part, the Government provided that the Government's reserved alternate sections should not be sold by the Government for less than $2.50 per acre and then only under the homestead act specified in the Act of 1864 (Sec. 6). The land grant and other rights and privileges were wholly conditioned upon acceptance of the terms of the Act by Northern Pacific within two years after its passage (Sec. 12), commencement of work within two years, and completion of not less than fifty miles per year after the second year, with completion of the whole road by July 4, 1876 (Sec. 8).

Northern Pacific claimed its due organization and acceptance, but was unable to finance construction of the road by public subscription. By several enactments which preceded the Joint Resolution of 1870, Congress attempted

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[5]Montana was a territory and continued as such until statehood was achieved on November 8, 1889.

[6]*St. Paul and Pacific R. Co. v. Northern Pacific R. Co.*, 139 U. S. 1.

to help Northern Pacific meet the conditions of the Act of 1864; these efforts proved unavailing.[7]

It is historical that the Act of 1864, and subsequent enactments in its enablement, were abortive, and the conditions of the Act were unfulfilled during the period from July 2, 1864, to May 31, 1870. This fact is material to the question of the applicability of the *Proviso* of the Joint Resolution of 1870 to the lands granted to Northern Pacific, including said Section 23.

2. The Terms and Conditions of the Joint Resolution of 1870 Were Accepted by Northern Pacific, the Road Was Constructed With the Proceeds From Its Bonds Secured by Mortgage, and the Right to Section 23 and Other Granted Lands Was Earned.

The sum of the rights afforded by the Joint Resolution of 1870 is an authorization to Northern Pacific to issue bonds secured by mortgage of all of its property in aid of construction; to have as to its main road and branch "the privileges, grants and duties provided for in its act of incorporation"; to be entitled to select lieu lands along the entire road from an additional belt extending ten miles beyond the limits defined in the Act of 1864. All of the foregoing rights are followed by two limiting *Provisos*, the first subjecting all "lands hereby granted" to settlement and pre-emption at a price of not exceeding $2.50 per acre, and the second requiring, in the event of sale under the mortgage, that "the mortgaged lands hereby

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[7] *United States v. Northern Pacific R. Co.*, 311 U. S. 317 at p. 326; and see: Act of May 7, 1866, 14 Stat. at L. 355; Act of July 1, 1868, 15 Stat. at L. 255; Act of March 1, 1869, 15 Stat. at L. 346; Act of April 10, 1869, 16 Stat. at L. 57.

granted" be sold at public sale at places in which situated in single sections or subdivisions thereof to the highest bidder.

Northern Pacific accepted the Joint Resolution of 1870 by creating bonds, secured by mortgage of all of its properties, and constructing the road with the proceeds therefrom. Eastward and westward extensions joined in Montana in 1883, and Northern Pacific Railroad Company, chartered by the Act of 1864, carried on the operation of the line until 1893. The land grant authorized by the Act of 1864 and affirmed as modified by the Joint Resolution of 1870 was earned by the completion of the road. In 1893, Northern Pacific Railroad Company defaulted on its mortgages, and under foreclosure proceedings Northern Pacific Railway Company, Respondent here, acquired title to all of the property of the federally chartered corporation, operated the road, and exercised the statutory rights, privileges and grants. Respondent Northern Pacific Railway Company's continuing obligation under the *Proviso* has been determined.[8]

3. Northern Pacific Selected Section 23 Pursuant to Both the Act of 1864 and the Joint Resolution of 1870 and Patent Thereon Was Issued Expressly Stating That It Was Pursuant to Both Congressional Acts.

On or about September 22, 1900, Northern Pacific filed with the General Land Office of the Department of Interior its Place List No. 36[9] wherein it recited its right by

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[8]Act of June 25, 1929; 46 Stat. at L. 41, Chap. 41; *United States v. Northern Pacific R. Co.*, 311 U. S. 317.

[9]Place List No. 36 was received in evidence and is transmitted to this Court [R. 136].

virtue of the Act and Joint Resolution of 1870 to receive patent to Section 23, in these words:

> "Northern Pacific Railway Company, the successor of the Northern Pacific Railroad Company, under and by virtue of the Acts of Congress, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route,' approved July 2, 1864, and 'a Resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road, and to secure the same by mortgage, and for other purposes,' approved May 31, 1870 . . . hereby makes and files the following list of selections of public lands claimed by the said Northern Pacific Railway Company, as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said Act of Congress, . . ."

Thereafter, on June 24, 1902, Patent No. 74[10] was issued to Northern Pacific covering Section 23, and other lands, again reciting that the grant was pursuant to the Act of 1864 and the Joint Resolution of 1870 in these words:

> *"To all to whom these presents shall come, Greetings:*
>
> *"Whereas,* by Act of Congress approved July 2, 1864, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route,' and the Joint Resolution of May 31, 1870, there was granted to the Northern Pacific Railroad Company, its successors and assigns

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[10]Patent No. 74 was received in evidence and is transmitted to this Court [R. 136].

. . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt through the Territories of the United States. . . .

"*Now Know Ye* that the United States of America, in consideration of the premises, and pursuant to the said Acts of Congress, *Have Given and Granted,* and by these presents *Do Give* and *Grant* unto the said *Northern Pacific Railway Company,* successor in interest to the Northern Pacific Railroad Company, its successors and assigns, the tracts of land listed as aforesaid, . . ."

The foregoing language is relevant as evidencing recognition, before any thought of the present controversy, of the effective regrant of the Joint Resolution of 1870 and its source as the origin of title to Section 23, thereby subjecting Section 23 to its *Proviso.*

4. Northern Pacific Contracted to Sell Section 23 to Petitioner's Predecessor, MaBelle Cobb, an Actual Settler, as Required by the Proviso of the Joint Resolution of 1870, but Reserved the Minerals in Derogation Thereof.

On November 30, 1909, Northern Pacific executed its Contract No. 5942[11] with MaBelle Cobb, and provided a stipulation in the Contract according with the Congressional intent expressed in the *Proviso,* in these words:

"As a material part of the consideration of this contract, without which it would not be made, the purchaser agrees that he will within one (1) year from the date hereof break and cultivate at least one-tenth of all of the tillable portion of the premises and

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[11]Contract No. 5942 was received in evidence and is transmitted to this Court [R. 136].

one-tenth per year additional each of the next succeeding two (2) years, or until three-tenths of all tillable land shall have been broken and put under cultivation, and will make proof of such cultivation on or before the 30th day of November in each year, satisfactory to the land commissioner of the vendor."

Contract No. 5942 provided for a purchase price payable to Northern Pacific of $2,880.00 for the 640-acre section, or $4.50 per acre, as against the stipulated maximum of the *Proviso* of $2.50 per acre. In addition, Northern Pacific reserved a part of the fee title, to-wit:

"Excepting and reserving unto the vendor its successors and assigns forever all minerals of any nature whatsoever including coal, iron, natural gas and oil, upon or in said land, together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the vendor shall pay to the purchaser the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations, including any improvements thereon. . . ."

Thereafter, and on June 14, 1918, Northern Pacific by deed granted Section 23 to Millard Stubrud, pursuant to its Contract No. 5942 with MaBelle Cobb, to whose right said Stubrud had duly succeeded.[12] The deed to Stubrud contains the mineral reservation above quoted.

Petitioner here succeeded to the title of Stubrud by conveyances of record.[13]

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[12]Deed dated June 14, 1918 was received in evidence herein and is transmitted to this Court [R. 136].

[13]Abstract of Title No. 5381, covering Section 23, was received in evidence and is transmitted to this Court [R. 136].

5. Petitioner's Action Here Under Review Was Timely Commenced, in a Court of Proper Jurisdiction, and Under Appropriate Allegations.

Petitioner, and his predecessors, were continuously in unchallenged and exclusive possession of all of Section 23 until September 3, 1952 [R. 96]. The mineral value of Section 23, and railroad grant lands in its region, were virtually dormant until shortly before that date. Not until the discovery of petroleum deposits of the so-called Williston Basin did controversy arise. The Williston Basin and various petroleum discoveries therein cover extensive areas of Montana, North Dakota and South Dakota; the limits of the productive areas are as yet unknown. Petitioner's Abstract of Title gave no hint of the mineral reservation in the Contract with MaBelle Cobb or in the deed from Northern Pacific to Stubrud; nor was there in the Abstract any intervening instrument or conveyance evidencing other than that the mineral estate was wholly vested in Petitioner. As the exploration of the Williston Basin approached Dawson County and Section 23, and the purported reservation came to light, on May 13, 1952, correspondence opened between Petitioner and Respondents, under which Respondents were apprised of Petitioner's challenge of their rights in the premises [R. 88, 91]. On September 3, 1952, Respondent, The Texas Company, appropriated use of Section 23 in connection with its operations on other lands adjacent thereto [R. 96-97]. On December 8, 1952, Petitioner, as plaintiff, instituted action in the District Court by Complaint, the first cause of action[18a] of which is tantamount to an action to

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[18a]The second and third causes of action allege the wholly wrongful misappropriation of use of Section 23 by The Texas Company for its operations on adjoining lands, and sought injunction thereon, which was granted, and damages, which were awarded to Petitioner.

quiet title and is designed to secure the adjudication of the invalidity of the mineral reservation in the deed from Northern Pacific to Stubrud [R. 3-10, 16].

Jurisdiction of the District Court was invoked under 28 U. S. C. Section 1332. Petitioner alleged his residence in the State of Iowa, that The Texas Company is a Delaware corporation, that Northern Pacific is a Wisconsin corporation, and that the amount in controversy is more than $3,000.00 exclusive of interest and costs [R. 2-4]. These allegations were admitted by Respondents [R. 17-37], and found to be true by the District Court [R. 111-112].

Northern Pacific moved for Summary Judgment [R. 54] and The Texas Company moved for Partial Summary Judgment [R. 52]. These motions resulted in Partial Summary Judgment [R. 66] which was incorporated in the Judgment entered October 13, 1955 [R. 127], adjudicating Northern Pacific the owner in fee of all minerals upon, in or under Section 23, and The Texas Company as possessed of a right to enter thereon as lessee of Northern Pacific [R. 128].

Reasons for Granting the Writ.

1. The Decision of the Court Below Lies Athwart the Congressional Intent That Public Lands and Their Values, Granted Solely in Aid of Railroad Construction, Find Their Ultimate Unencumbered Disposition to the Public at the Stipulated Maximum Return of $2.50 per Acre to Northern Pacific.

What we here say of Section 23 is of equal application to all of those parcels among the forty million acres granted to Northern Pacific which have heretofore been disposed of to settlers by Northern Pacific with little or no service to the *Proviso* of the Joint Resolution of 1870. The issue to be decided is whether the *Proviso* shall be forever entombed as a Congressional expression avowedly in the interest of the general public, but wholly illusory in result.

(a) THE JOINT RESOLUTION OF 1870 WAS IN ITS VERY ESSENCE NECESSARILY A REGRANT, AND AS SUCH, APPLICABLE IN ALL OF ITS TERMS AND PROVISIONS TO ALL OF THE THEN UNEARNED LANDS GRANTED TO NORTHERN PACIFIC UNDER IT AND THE ACT OF 1864.

The Act of 1864 expressly prohibited mortgage or lien of the granted lands; as well, it restrained alienation thereof until patent, which patent was dependent upon adjacent construction of the road and acceptance by the President's Commissioners. See, *St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1. Only by the Joint Resolution of 1870 did Northern Pacific achieve a full fee to lands adjacent to accepted construction. Prior to the adoption of the Joint Resolution of 1870, the conditions of the Act of 1864 were unfulfilled by Northern Pacific, except as to

such earned lands. It stood, on May 31, 1870, with some indeterminate defeasible interest in unearned lands by virtue of its failure to fulfill the conditions of the Act of 1864, in an estate less than the fee by virtue of its lack of power to encumber. The Joint Resolution of 1870 granted a complete title to the alternate sections, as earned, it affirmed the prior grants of the Act of 1864, and added the power to mortgage unearned lands theretofore wholly lacking from the fee. Unless the Joint Resolution of 1870 is applicable to the entire land grant unearned at the date of its adoption, there is no source of origin of Northern Pacific's title. Northern Pacific thereafter accepted the regrant of the Joint Resolution of 1870, and subjected itself to the limitations of its *Provisos*, on the principle that the burdens follow the benefits accepted. That the Joint Resolution of 1870 was a regrant which was *sine qua non* to the origin of Northern Pacific's title to the granted lands is demonstrated by reasoning which we will summarize.

The financing method originally chosen by Congress is spelled out in the Act of 1864. Construction was to be financed out of public subscription to stock and patent to public lands as each 25 miles of the road was acceptably constructed, without limitation upon resale of lands earned as to settlement or amount of sale price or time of sale. In order to protect the marketability of railroad patented lands, the United States subjected itself to the restriction that it would not sell its reserved alternate sections of public lands at a price of less than $2.50 per acre, and then only to settlers under the "Act to secure homesteads to actual settlers on the public domain" of May 20, 1862. (See Sec. 6 of the Act of July 2, 1864.) Thus, as the road construction progressed, revenue from resale of railroad patented land would be a source of funds in aid of

construction. As determined by this Court, this plan of financing failed.[14]

During the interval between the Act of July 2, 1864, and the Joint Resolution of 1870, the public right to be secure in the eventual ownership of railroad granted lands became of the utmost concern. See *Great Northern R. Co. v. United States*, 315 U. S. 262. This policy in favor of the public, coupled with the circumstance that Northern Pacific failed to perform the conditions of the Act of 1864, renders it well nigh inconceivable that Congress would adopt a *Proviso* requiring disposition to settlers of merely that fraction of the grant adjacent to the newly authorized branch line over the Cascades, and at the same time impose no condition whatsoever on the nearly 2000 miles of main line from Lake Superior to the new terminus at Portland, when both the changed branch line and main line were fully dependent upon the authority and benefits afforded by the Joint Resolution of 1870.

The language of the Joint Resolution of 1870 confirms the conclusion that the *Proviso* is applicable to the entire unearned grant. First, the Joint Resolution authorized the mortgage of *all* of Northern Pacific's property *of all kinds and description*, thereby empowering the mortgage of its entire unearned land grant, and making it plain that the Resolution is applicable to all lands encompassed by both the Act of 1864 and the Joint Resolution of 1870. Next, the Joint Resolution of 1870 reaffirms the authorization to construct the road "under the provisions and with the privileges, grants and duties provided for in its act of incorporation" from the original point, specified

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[14] *United States v. Northern Pacific R. Co.*, 311 U. S. 317 at p. 326.

in the original Act and unspecified in the Joint Resolution, via a changed main line route to Portland, with authority for a branch line to Puget Sound through the Cascade Mountains; thus again, in its reaffirmation of the authority to construct the road, the reference is to the entire line. Next, in the event "in any state or territory" the amount of land granted is not available, an additional "lieu land" belt is defined; the reference to "state or territory" makes it plain that the Joint Resolution of 1870 is embracing the line from beginning to end. Lastly, within the single section, comes the twofold *Proviso:* The first referring to disposition and the second referring to foreclosure sales, and each based upon the words "lands hereby granted." The *Proviso* governs all that has gone before. The words "lands hereby granted" cannot be applied to a small fraction of the entire grant as to eventual disposition to settlers, without being equally applicable to but a small fraction of the entire grant as to foreclosure sales. Yet it has never been contended that the *Proviso* as to foreclosure sales is applicable only to this small fraction of the entire grant, no doubt for the reason that the mortgage authorized by the Joint Resolution of 1870 is clearly applicable to the entire grant. Just as the *Proviso* as to the foreclosure applies to the land grants along the entire line, including the branch, so also its counterpart as to eventual disposition of granted lands remaining unsold or subject to the mortgage, applies to the lands granted along the entire line from beginning to end, and not to the comparatively minor stretch of the branch line across the Cascade Mountains.

Documentary support for this conclusion is found in the instruments under which Northern Pacific made its selection, as well as in the patent signed by President

Theodore Roosevelt. Both Place List No. 36 and Patent No. 74 recite that they are pursuant to the Act of 1864 and the Joint Resolution of 1870. If, in fact, the Joint Resolution of 1870 was not a regrant standing as a part of the origin of title, then it was neither authority for selection nor authority for patent.

The applicability of the *Proviso* to all of the granted lands, and hence to Section 23 here involved, is confirmed by later Congressional expressions. Thus the Joint Congressional Committee acting under the Resolution of June 5, 1924,[18] among its other castigations of the railroad's collusion, fraud and flaunting of the legislative and public will, states as one of its reasons for the forfeiture of Northern Pacific's then outstanding indemnity claims: "(d) the failure of the Northern Pacific Railroad Co. to dispose of any of the granted lands through settlement and pre-emption after July 4, 1884, as required by the resolution of May 31, 1870 . . ."[19] Acting upon the Committee Report, the Congress by its Act of June 25, 1929 expressed its continuing purpose and intention that the policy of the Joint Resolution of 1870 relative to disposition of granted lands should prevail, for which see Appendix B, page 26.

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[18]43 Stat. at L. 461.

[19]The Report of that Committee is found in the Congressional Record of March 2, 1929, 70th Congress, Second Session, Vol. 70, Part 5, pp. 5118 to 5122.

(b) THE PROVISO BEING FULLY APPLICABLE TO ALL GRANTED LANDS, THE MINERAL RESERVATION IN CONFLICT THEREWITH ON SECTION 23 IS VOID.

As noted in the Statement, the statutory time for completion of the road was July 4, 1879, and the road was actually completed in 1883, the Contract with MaBelle Cobb was executed in 1909, and the time intervening was well beyond the five years stipulated in the *Proviso* after which Northern Pacific was required to sell the land for settlement. Contract No. 5942 spelled out the necessity for the grantee to improve the land by the tilling thereof and satisfactorily report thereon to Northern Pacific's Land Commissioner. The price exacted from the settler, MaBelle Cobb, was $4.50, an unlawful consideration in that the Joint Resolution of 1870 prescribed a price of not more than $2.50 per acre. The exaction of mineral reservation was also illegal. The principle is established by *Oregon and California R. Co. v. United States,* 243 U. S. 549, 61 L. Ed. 890, wherein this Court said, at pp. 552 and 553:

> "An immediate and sufficient answer to the contention would seem to be that the grant was not absolute, but was qualified by a condition in favor of settlers, and if the 'lands' granted had such incidents, the 'lands' directed to be sold to actual settlers were intended to have such incidents. That is, if the 'lands' granted carried by necessary implication all that was above the surface and all below the surface, to the railroad company, they carried such implication to the actual settler. In other words, what 'lands' meant to the railroad company they meant to the settler, embraced within his right to purchase and acquire."

An earlier *Oregon and California R. Co.* case, dealing with a similar land grant proviso, is authority for the rule that the grant is law as well as contract, and has the constancy of laws as well as their command, and remains operative and obligatory until repealed. See, *Oregon and California R. Co. v. United States,* 238 U. S. 393.

The foregoing authorities, coupled with the rule that a law relative to a contract becomes a part of the contract[17] constitute the *Proviso* a part of the contract and the deed issued pursuant thereto, as fully as though written therein. The mineral reservation being in conflict with the *Proviso* in the contract and in the deed, and the reservation being against the law, it is void and without legal effect *ab initio.*[18]

In considering the title of Petitioner, as successor to the title of MaBelle Cobb, it is proper to consider that she was peculiarly within the legislative contemplation of the *Proviso* as a consequence of the terms of the contract executed with her by Northern Pacific. She it was who was required to improve the land by tillage for three consecutive years and report annually thereon to the Land Commissioner for Northern Pacific. The successor, Stubrud, received the deed to Section 23 from Northern Pacific, thereby establishing full compliance with the settlement intent of the *Proviso,* and bringing himself squarely within its benefits. As a consequence, we do not have an issue of whether the *Proviso* created a trusteeship, a third party beneficiary contract, or some inchoate interest in favor of the undesignated members of the

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[17]*Valier Company v. State,* 123 Mont. 329, 215 P. 2d 966, Cert. Den. 340 U. S. 827, 71 S. Ct. 63, 95 L. Ed. 607.

[18]*Lowery v. Garfield County,* 122 Mont. 571, 208 P. 2d 478.

general public, which distinguishes this case from the holdings in the *Oregon and California R. Co.* cases, *supra*. But we do concern ourselves with whether the original settlers of the West, the pioneers whose traffic with the railroad was within the contemplation of the Congress as providing its operating revenue, and their successors, shall reap the full measure intended by the Congress, or whether a railroad shall again hold within its private hoard a part of the substance of the land and thereby vitiate the often stated continuing Congressional intention respecting railroad grants.

2. The Opinion of This Court in United States v. Northern Pacific R. Co., Brought Pursuant to Congressional Act, Serves to Support This Petition.

We have included in Appendix B, at page 26, certain of the more pertinent provisions of the Act of June 25, 1929, directing the forfeiture of certain land grants to Northern Pacific, and instructing the Attorney General to file an action to quiet title, for accounting and damages against Northern Pacific, wherein the Congress expressed its continuing intent as to disposition by Northern Pacific in accordance with the policy of the Joint Resolution of 1870. By the Act of May 22, 1936,[19] there was authorized a direct appeal to this Court of the action against Northern Pacific instituted by the Attorney General in accordance with the Act of June 25, 1929 in the District Court for Eastern Washington. The *Proviso* of the Joint Resolution of May 31, 1870 was a major issue.

The Government contended, in its appeal No. 3 before this Court, that the *Proviso* was binding upon Northern

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[19] 49 Stat. at L. 1369, Chap. 444.

Pacific as to every part of the granted lands, that Northern Pacific had breached the policy of the United States prescribed in the *Proviso*, thereby wholly defeating its right to any further award.[20] Northern Pacific moved to dismiss the charge, was sustained by the special master, and the District Court ordered the dismissal. On appeal, this Court reserved its ruling:[21]

> "The justices who heard this case are equally divided in opinion upon these issues. No opinion is expressed upon them, and they are reserved, in view of the fact that our rulings on other issues may be dispositive of the entire controversy."

The judgment was reversed:[22]

> "The appeal in No. 4 is without merit, but, upon the appeal in No. 3, the judgment is reversed and the cause is remanded for further proceedings as indicated in this opinion."

In its paragraph 18 of the opinion, this Court passed upon the Government's claim for damages by reason of Northern Pacific's breach of the *Proviso*. The Court specifically held, contrary to the ruling of the District Court, that the Government was entitled to prove any damage to it, or advantage to Northern Pacific, arising out of the breach of the *Proviso*[23] as to additional lands

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[20]*United States v. Northern Pacific R. Co.*, 311 U. S. 317 at p. 338.

[21]311 U. S. 317, at p. 342.

[22]311 U. S. 317, at p. 376.

[23]As an aside, we remark that the holding is judicial determination that Respondents here are bound by the *Proviso* as successors to the federally chartered corporation, the foreclosure proceedings and sale notwithstanding.

granted by the Joint Resolution, but not as to lands *acquired* under the grant of 1864.[24] *United States v. Northern Pacific R. Co.* unquestionably determined that the *Proviso* established a legally enforceable obligation. It unequivocally decided that the obligation applied to all additional lands granted by the Joint Resolution of 1870. The court reserved the question as to whether the *Proviso* applied to every part of the granted lands on the issue of forfeiture of right to further awards of lands; at the same time, the court held that no damages would lie as to lands "acquired" under the Act of 1864, but that damages would lie as to the lands granted under the Joint Resolution of 1870. *These rulings would be inherently contradictory unless the word "acquired" is given its logical meaning, namely, those lands actually earned by adjacent construction accepted by the Government under the terms of the Act of 1864, but prior to and without using the benefits of the Resolution of 1870.* The primary use of the word "acquired" is to gain "usually by one's own exertions." (Webster's New International Dictionary, Second Edition, Unabridged, 1945).

The Court also reserved the question of whether the breach of the conditions of the Act of 1864 by Northern Pacific defeated its entitlement thereunder.[25] Contrary

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[24]311 U. S. at p. 368, wherein this Court said: "We hold, contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring that the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864. We hold further that the company was not a trustee of the lands for the United States either in its own right or in behalf of possible settlers. It results that the Government cannot call upon the company to account as a trustee for the proceeds of sale of the lands."

[25]311 U. S. at 365, par. 1.

to the conclusions of the lower courts in the judgment to which this Petition is addressed, the Court in *United States v. Northern Pacific R. Co.* did not attempt to delineate the lands which were "acquired" by Northern Pacific under the Act of 1864, or those which were granted under the Joint Resolution of 1870. This was a factual matter, the decision on which was dependent upon the taking of testimony and the cause was remanded for that purpose. *The ultimate decision on this issue rests upon determination of which lands were "acquired" by Northern Pacific as a result of its road construction completed under the Act of 1864 without the benefit of mortgage funds. All land grant acquisitions achieved by construction of the road with mortgage funds find their origin in the additional grant of the Joint Resolution of 1870, which conveyed the power to encumber and with it the financial ability, theretofore lacking, to construct additional road and "acquire" additional land. It is factual that the road was not built in Montana until 1880, that the first mortgage conveying Section 23 was executed on May 1, 1879; thereby Northern Pacific accepted the benefit of the Joint Resolution of 1870 as to said Section 23, and accepted the limitations of the Proviso.*

As we have stated, the *Proviso* applied to all lands subjected to the mortgage authorized by the Joint Resolution, as is evidenced by the use of the words "lands hereby granted" both in the *Proviso* as to disposition, and in the *Proviso* as to mortgage foreclosure sale. The words "or remain subject to the mortgage by this act authorized" in the *Proviso* as to disposition become nugatory in the absence of a construction giving life to the legislative intent that the *Proviso* would apply to all lands regranted by the Joint Resolution with a further quantum

of the fee, to-wit, the power to mortgage, which had been withheld in the Act of 1864. That this Court; in the *United States v. Northern Pacific* case, used the words "additional lands granted by that Resolution" to distinguish from lands *earned and acquired* under the Act of 1864, becomes clear with recognition that no authority was required by Northern Pacific to mortgage lands earned by railroad construction accepted by the President's Commissioners prior to, and without utilizing the benefits of, the Joint Resolution.

The legislative history[20] is consistent with the above construction of the *Proviso*. Thus, a proposed amendment to apply the *Proviso* to all lands "heretofore and hereafter" granted was defeated, as was an amendment to limit the *Proviso* to the "additional alternate sections" granted by the Joint Resolution, the latter being a patent reference to sections adjacent to the new branch line alone.

Even though it should be held that the language of the Court in *United States v. Northern Pacific R. Co.* has the meaning attributed by the courts below in this cause nonetheless the decision would not be controlling in this case. Foremost in support of this conclusion is the Act of June 25, 1929, which has the continuing force of law, and precludes any final determination of the action commanded by Congress against Northern Pacific, except in compliance with its provisions. This case was

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[20]The proceedings in Congress may be found in the following issues of the Congressional Globe: In the Senate: Feb. 8, 1870, p. 1097; Feb. 28, pp. 1584-1586; Mar. 2, pp. 1624-1628; Apr. 7, pp. 2480-2486, 2491-2495; Apr. 9, pp. 2539-2547; Apr. 11, pp. 2569-2584; Apr. 20, pp. 2833-2848; Apr. 21, pp. 2867-2869. In the House: May 5, pp. 3263-3271; May 10, pp. 3343-3348; May 11, pp. 3365-3368; May 25, pp. 3786-3798; May 26, pp. 3850-3853.

compromised, and adjudication as contemplated by Congress was not had, and Judge Schwellenbach so stated.[27] The District Judge's misgivings as to the decree based upon settlement, without Congressional authority, are obvious from his expressions. The consequence of this decree by compromise is the absence of ruling on the facts and contentions which this Court reserved, and Petitioner is not judicially barred by the rule of *stare decisis* from proving those facts which establish the Joint Resolution of 1870 as the origin of title to said Section 23. Most certainly, the harsh deprivation of petitioner's day in Court by summary judgment was unjustified.

Secondly, the Court's opinion in *United States v. Northern Pacific R. Co.* did not deal with oil, gas or minerals of any kind. This action by a place lands grantee of the railroad, a grantee standing in the shoes of a settler chosen by Northern Pacific, who is invoking the continuing Congressional expressions in his favor, and the reserved ruling on the question by this Court, is the only one of its kind. As a prime beneficiary of the *Proviso* Petitioner seeks his right to a full hearing unshackled by an interpretation placed upon a few short sentences arising in the course of litigation between parties differently situated, with a myriad of wholly different issues, and complicated by allegations of fraud, mistake, and administrative mishandling. Again, we respectfully submit, the rule permitting summary judgment has no application where such substantial rights and important factual issues are involved.

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[27] *United States v. Northern Pacific R. Co.*, 41 Fed. Supp. 273, at 280.

Lastly, if it be true that *United States v. Northern Pacific R. Co.* limits the right of the government to damages from Northern Pacific, and no more can be claimed from the language, the public interest in freedom from monopoly of public resources requires that the holding be limited to the parties there before the Court. We respectfully contend that the precise facts and issues in this case have not been decided, and are of such importance as to merit this Court's attention and authoritative final determination. Should the Court construe the language of *United States v. Northern Pacific* as susceptible of the meaning followed by the lower courts, nevertheless the continuing Congressional intent that such lands find their ultimate way into the hands of the public, calls for determination of the precise question here presented, in order that the clearly expressed mandate of Congress to Northern Pacific not be further subverted.

3. The Law of Estoppel in Private Grant, Relied Upon by the Court of Appeal, Is Without Application Where the Origin of Title Is Congressional Act; Neither Does the Law of Estoppel Properly Apply Here, Where Judgment Was Made Summarily.

The Court of Appeal chose to decide this case in principal reliance upon rules of estoppel which, without doubt, govern purely private conveyancing and quiet title actions. It overlooked the laws by which public land, Section 23, came into the possession of Northern Pacific, and in turn, MaBelle Cobb and her successors. In substance and effect Congressional grants of public lands to a railroad, subject to the limitations of a *Proviso* such as here, were a transfer of ownership and administration of the public lands from the government to the railroad in order that the railroad could derive the proceeds

from sale of the lands in aid of construction. Northern Pacific, from May 31, 1870, until five years after completion of the road, had the right to deed the land to whom it would, for such consideration as it would. The reason for the time limitation ceases if, at its expiration, Northern Pacific continued to be free to deal at will. MaBelle Cobb, having paid the price, and settled the land in accordance with the contract stipulations, became the owner of the unencumbered, unreserved title to Section 23, as fully as would have been the case had she been dealing with the Department of Interior. Her full measure of title came by law, which the purported reservation could not destroy. Hence, this is not a case of private grant, but a reliance upon Congressional Act, continually re-expressed, as the origin of a full title which renders the mineral reservation contrary thereto void (see: *Oregon C. R. Co. v. United States,* 238 U. S. 393). The rules of estoppel in private conveyancing have no application to this case.

Furthermore, the very nature of the defense of estoppel would seem to preclude the grant of respondent's motion for summary judgment. The defense of estoppel was respondent's burden to establish. It is equitable in nature, cannot be founded upon a void provision in an instrument,[28] and is conditioned by the "clean hands" maxim. Estoppel is ruled out as a defense by *Oregon v. United States, supra,* in which the Court said, in a railroad grant action,

> "We may observe again that the acts of Congress are laws as well as grants, and have the constancy of laws as well as their command, and are operative

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[28] *Valier Company v. State,* 123 Mont. 329, 215 P. 2d 966, Cert. Den. 340 U. S. 827; 12 Am. Jur. 769.

and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence, and estoppel, and even to the defenses of laches and the statute of limitations."

Estoppel, and the right to invoke it, is of its very essence a fact question, the evidence in rebuttal of which is greatly dependent upon the form in which the estoppel is claimed in the trial court. Under these circumstances, the grant of summary judgment was improper.

Conclusion.

United States v. Union Pacific R. Co.[29] holds that Congress did not intend to deliver the mineral wealth of the country to the railroads by the land grant acts. The case deals with minerals underlying the right-of-way and does not become controlling precedent in this place lands matter; yet the principle upon which it is founded supports the grant of this Petition. The opinion makes plain that the federal policy after the gold strike in California in 1849, was to reserve for public use all known mineral lands. On this Petition, we pose the settler from among the public and their successors, on the one hand, as against Northern Pacific on the other, as the Congressionally intended eventual beneficiary of lands granted where mineral wealth was later discovered. In the *Union Pacific* case it was submitted that public lands were granted that they might be sold by the railroads at maximum marketability in proceeds with which to aid in construction. Also, it was argued that mineral reservations neither afforded maximum return, nor in any other man-

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[29]Decided by this Court on April 8, 1957.

ner aided in building the road, the sole and only purpose for grant of public lands. Furthermore, it was demonstrated that Congress and the nation did not even conceive of the device of severance of the minerals from the fee until thirty years and more after 1870. Had Northern Pacific complied with the terms of the *Proviso* and sold the land within the Congressionally contemplated time after the completion of the road, the settlers would have received the fee unreservedly, simply because the device of reserving mineral rights from the fee was then unknown to Congress or Northern Pacific. These points verify the conclusion that by the *Proviso* of the Joint Resolution of 1870, Congress intended that Northern Pacific convey to settlers the whole fee in order that these lands, unsold during the construction period and five years thereafter, be opened and unreservedly belong to the public, further that this intention found its concept in the belief that the public, succeeding to these public lands and their values, would best accelerate the growth, development and economic health of the country, a concept as valid today as it was in 1870.

For the foregoing reasons, we respectfully submit that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HAROLD JUDSON,
Attorney for Petitioner.

RALPH J. ANDERSON,
STANLEY P. SORENSON,
J. R. VAUGHAN,
Of Counsel.

APPENDIX A.

Opinion of the United States Court of Appeals.

United States Court of Appeals, Ninth Circuit.

Theodore B. Russell, Appellant, v. The Texas Company, a corporation, Frederick T. Manning Drilling Company, a corporation, and The Northern Pacific Railway Company, a corporation, Appellees.

The Texas Company, a corporation, Appellant, v. Theodore B. Russell, Appellee. No. 14983.

Nov. 24, 1956.

Action by surface owner to quiet title to real property and for damages arising from use of surface rights by defendant. The United States District Court for the District of Montana, William D. Murray, J., rendered judgments adverse to surface owner on quiet title cause of action and in favor of surface owner in causes of action based upon damages and the surface owner and one of the defendants appealed. The Court of Appeals, Halbert, District Judge, held that where owner of surface sent to occupier thereof an offer of revocable license to use surface at stated rental per day and recited that continued use of surface would be constituted as an acceptance of offer, and occupier did not cease using premises, it was liable for damages at rate stipulated in offer of revocable license from the day it received the offer.

Judgments affirmed.

Ralph J. Anderson, Stanley P. Sorenson, J. R. Vaughn, Helena, Mont., for appellant.

H. J. Coleman, Cale Crowley, Coleman, Jameson & Lamey, Billings, Mont., Walter Will, Denver, Colo., for appellee and cross appellant, The Texas Co.

Cale Crowley, H. J. Coleman, Coleman, Jameson & Lamey, Billings, Mont., M. L. Countryman, Jr., St. Paul, Minn., Robert P. Davidson, Billings, Mont., for appellee, Northern P. Ry. Co.

Before STEPHENS and BONE, Circuit Judges, and HALBERT, District Judge.

HALBERT, District Judge.

Plaintiff-appellant, Russell, claims title to certain real property, which will be referred to in his opinion as section 23. Russell's predecessors in interest acquired their interest in this property from the Northern Pacific Railway Company, defendant-appellee herein, through a contract followed by a warranty deed executed in 1918. In both the contract and the deed was a reservation of mineral rights by the grantor.[1] The Texas Company, defendant-appellee and cross-appellant herein, has been conducting extensive operations on section 23 since 1952 under an oil and gas lease granted by Northern Pacific Railway Company. The Texas Company has also made use of the surface of section 23 in connection with operations carried on by it on lands other than section 23.

Russell, as plaintiff, instituted this action seeking relief under three causes of action. The first cause of action is

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[1]The text of the mineral reservation is as follows:

"* * * excepting and reserving unto the grantor, its successors and assigns, forever, all minerals of any nature whatsoever, including coal, iron, natural gas and oil, upon or in said land, together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the grantor, its successors and assigns, shall pay to the grantee, or to his heirs or assigns, the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations, including any improvements thereon; * * *"

tantamount to a quiet title action designed to have the mineral reservation by the Northern Pacific Railway in the 1918 deed, and the subsequent oil and gas lease to The Texas Company adjudged void, and at the same time have the alleged clouds, thereby created, removed. By the second and third causes of action, Russell seeks to recover damages from The Texas Company for its use of the surface of section 23 in connection with its operations on section 23 and on adjacent lands.[2]

First Cause of Action.

I.

Russell's Appeal From the Judgment in Favor of Northern Pacific

Russell's first cause of action is predicated upon the theory that the Acts of Congress granting to the Northern Pacific Railroad Company the lands, of which section 23 is a part, so limited the interest, which the Company acquired, that it was not at liberty to reserve the mineral rights in a subsequent conveyance.

The original granting act of 1864, 13 U. S. Statutes at Large, Ch. 217, p. 365, gave to the Northern Pacific Railroad Company the right to acquire a patent to certain lands in aid of its construction of a line from Lake Superior to the Puget Sound. The 1864 Act, *inter alia*, suspended the Company's power to mortgage the lands granted thereunder. In 1870, Congress passed a Resolution which removed the mortgage restriction and granted

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[2]The action has, by stipulation, been dismissed as to Frederick T. Manning Drilling Company, originally named as a defendant in the suit.

additional lands in Oregon and Washington to the Company. This Resolution included a proviso clause which, in essence, required the Company to open up the lands "hereby granted" to settlement and pre-emption at the expiration of five years after the completion of the line if such lands had not, before that time, been mortgaged, sold or otherwise disposed of, 16 U. S. Statutes at Large, Res. 67, p. 378.*

It is Russell's contention that the 1864 Act gave to Northern Pacific something less than a fee, in that the power to mortgage was withheld. He reasons that since the 1870 Resolution removed this restriction, there was, in effect, a re-grant of the 1864 lands at the time the Company chose to exercise its newly acquired power to mortgage, so that these lands came within the meaning of the words, "hereby granted," in the proviso clause. Russell then argues that since section 23, in particular, was subject to settlement and pre-emption, it was not susceptible to a mineral reservation by the Northern Pacific.

The District Court, sitting without a jury, found contrary to Russell's contention on this first cause of action and upheld the validity of the mineral reservation and the oil lease. No memorandum was filed in connection with this finding, but the record reveals that Judge Murray, who heard the case, felt that United States v. Northern Pacific Railway Co., 1940, 311 U. S. 317, 61

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*To keep the record straight, it should here be noted that Northern Pacific Railway Company, defendant-appellee herein, succeeded to the rights of Northern Pacific Railroad Company by virtue of a mortgage foreclosure and sale in 1903.

S. Ct. 264, 85 L. Ed. 210, was determinative of the issue.[4] On this first cause of action the trial court entered judgment in favor of Northern Pacific Railway Company. Russell claims this was error and appeals from that portion of the judgment.

It is fundamental that in actions to quiet title or to remove a cloud on title, the plaintiff must succeed on the strength of his own title, and not on the weakness of the defendant's title, Williams v. Baker, 17 Wall, 144, 84 U. S. 144, 21 L. Ed. 561; Moodey v. Dale Consolidated Mines, 9 Cir., 81 F. 2d 794, certiorari denied 299 U. S. 549, 57 S. Ct. 11, 81 L. Ed. 404; and Hinton v. Staunton, 124 Mont. 534, 228 P. 2d 461.

Appellant in the case at bar would have us declare void a mineral reservation which appears expressly in the very deed through which he, himself, claims title. He asserts no independent source of title. On the contrary, he insists that the express recitals in the deed to his predecessor in title (of which he had notice) were ineffective irrespective of the intentions of the parties to the conveyance or the bargain into which they entered. Even if

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[4]United States v. Northern Pacific Railway Co., *supra*, grew out of an action which the government brought against the Northern Pacific Railway Co. to recover damages, *inter alia*, for the wrongful disposition of some of the lands granted it in 1864 and in 1870, claiming that the proviso clause in the Resolution of 1870 applied to all the lands granted in 1864 as well as the additional lands granted in 1870. The Supreme Court in an opinion by Mr. Justice Roberts stated 311 U. S. at page 368, 61 S. Ct. at page 287:

"We hold, contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring that the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864. * * *"

The court then added in a footnote that the legislative history was so convincing that it could reach no other conclusion.

we were to resort to hypothesizing, it would, indeed, be difficult for us to imagine a more obvious case of estoppel.

The appellant would have us remove him from this curious position by applying the rule stated in Oregon & C. R. Co. v. United States, 1915, 238 U. S. 393, 35 S. Ct. 908, 59 L. Ed. 1360, to the facts of the instant case. In that case, the government brought an action against the railroad company to enforce certain covenants which Congress imposed on it by way of proviso in the Acts which granted to the Company the land involved in the controversy. By accepting the grant, the company covenanted to sell the land at a specified time to actual settlers only, at a stipulated price per acre. The Company sought to defend against the government's action for breach of this covenant on such grounds as waiver, acquiescence, and estoppel. The Supreme Court in an opinion by Mr. Justice McKenna held that such defenses were not available against the government in an action to enforce a clear Congressional mandate.

Can the appellant in the case at bar bring himself within the effect of this Rule? We think not. Even assuming *arguendo* that appellant's theory is sound and that Congress did in 1870 impose a mandatory duty on the Northern Pacific to convey a full fee title to the land here involved, with no reservations, appellant has indicated no authority by which he is enabled to enforce that mandate. Nor has he attempted, if indeed it were possible, to classify himself as a third party beneficiary or a *cestui que trust* with respect to this land. To overlook a distinction so obvious is to vault the appellant into a status which he has not acquired. In such legal gymnastics we will not indulge.

The law is clear that where the grantee of surface rights or his successors in interest seek to remove the cloud of the grantor's mineral reservation, it must be established that the grantee's rights to the interest reserved flow from an independent source of title, See 31 C. J. S., Estoppel, § 38(f), p. 218. Where, however, the surface owner claims title to the mineral rights, which his grantor expressly reserved to himself, on the theory that his grantor had no right to make such a reservation, the owner of the surface is estopped from asserting that the mineral rights thereby passed to him in the instrument of conveyance, Morse v. Smyth, D. C. 1918, 255 F. 981; Wier v. The Texas Co., 5 Cir., 1950, 180 F. 2d 465. This doctrine has been enunciated in as many ways as there are individual factual situations to justify its application.[8] Estoppel, in the nature of an equitable concept, is designed to protect the reliances and expectations of innocent persons from detrimental devastation by those who by assent and recognition have induced those reliances and expectations. Whenever the invocation of a rule results in the denial of a remedy, caution implicitly governs discretion. Caution must give way to reasoned judgment, however, where, as in the case at bar, the facts so overwhelmingly justify the application of the doctrine. To disregard its applicability in this case would be to invite a miscarriage of justice.

Even if we felt constrained to recognize the right of Russell to raise the question of the validity of the mineral

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[8]Greene v. White, 1941, 137 Tex. 361, 153 S. W. 2d 575, 136 A. L. R. 626; Ratliffe v. Meyers, 5 Cir., 26 F. 2d 79; Dillon Inv. Co. v. Kinikin, 172 Kan. 523, 241 P. 2d 493; 16 Am. Jur. Deeds, § 301; 19 Am. Jur. Estoppel, § 26, and 31 C. J. S. Estoppel, § 38(f).

reservation by virtue of the two granting acts, we are convinced that the holding in United States v. Northern Pacific Railway Co., 1940, 311 U. S. 317, 61 S. Ct. 264, 85 L. Ed. 210, is determinative of this issue.

For the reasons given we are of the view that the trial court ruled correctly on this first cause of action.

SECOND AND THIRD CAUSES OF ACTION.

The damages which Russell seeks to recover from The Texas Company in his second and third causes of action are based on the following:

(*A*) *The reasonable value of the use of the surface of section 23 including the use of water, rock and roads thereon in connection with operations on adjacent lands, from September 3, 1952, to October 30, 1952* [The latter is the date on which a revocable license to continue such use was accepted by The Texas Company.].

(*B*) *The sums alleged to be due under a revocable license commencing on October 30, 1952, which obligated The Texas Company to pay Russell $150.00 a day for the continued use of section 23 in connection with its operations on adjacent lands, a use admittedly in excess of the easement flowing from the mineral reservation in the original deed.*

The evidence shows that The Texas Company received on October 30, 1952, an offer from Russell for a revocable license to cover the use of section 23 in connection with operations on adjacent lands for the sum of $150.00 a day, which offer contained the express proviso that, "your continued use of the roadway, water and/or materials will constitute your acceptance of this revocable permit." The evidence further shows that The Texas Company

did so continue to use section 23 until November 22, 1952, and it was not until sometime in December of that year that Russell finally received a communication from the Company to the effect that the offer was rejected. Neither party depends in any material respect on this purported rejection.

(C) *The reasonable value of the use of the portion of the surface of section 23 which admittedly was required to be paid under the terms of the original mineral reservation.*

Russell argues that this compensation should be measured by the most valuable use to which the surface could be put, which he contends is for the purpose of oil well drilling.

(D) *The value of the water taken from section 23 in connection with operations on section 23, which Russell contends was not included within the terms of the easement for use of the surface.*

In deciding these issues, the trial court found that there was not enough evidence in the record to discern what portion of the water was used by The Texas Company in connection with its operations on adjacent land prior to the date on which the revocable license went into effect, and that the damages for the taking of the rock were so inconsequential that they would be included in the award of compensation for the exercise of the easement. Furthermore, the trial court was of the opinion that the witness who testified with respect to the value of the use of the roads, in connection with operations on the adjacent land during this period, was not qualified to give testimony as an expert witness. The trial court also found that by its continued use, as prescribed by the offer

for a revocable license, The Texas Company thereby accepted the offer, and thus became bound to pay $150.00 a day from the date of receipt of the offer to the date of termination of its wrongful activities (October 30 to November 22, 1952).

The trial court determined that the most valuable use to which Russell could devote the land was grazing, and assessed the damages for the use of the land at the rate of $10.00 an acre. The trial court reasoned that since Russell had no title in the surface for the purposes of oil well drilling, he must be limited to a recovery based on the value of the use of the land to which he [Russell] could, with legal propriety, put the land.

The trial court did not decide the issue of whether or not The Texas Company was entitled to the use of surface water in connection with the exercise of its rights of entry and use of section 23 for drilling purposes. It instead found that the evidence submitted bearing on the valuation of that water was not sufficient to enable the court to arrive at any discernible measure of damages.

Judgment was entered in favor of Russell and against The Texas Company in the amount of $3,837.60, which consisted of $3,600.00 due under the revocable license and $237.60 due for the use of the land under the terms of the mineral reservation.

The Texas Company appeals from that portion of the judgment which awarded Russell $3,600.00 as the amount due under the terms of the revocable license, contending that the court erred as a matter of law in finding that the offer for the said license was accepted.

Russell appeals from that portion of the judgment against the Texas Company which awarded him $237.60,

claiming that the court, in arriving at the measure of compensation, applied the wrong rule of damages. Russell further contends on this appeal that the trial court's findings on the evidence were incorrect with respect to the amount of compensation that should have been allowed to him for the water, rock and roads, which were used by The Texas Company in connection with operations on other lands, prior to the date of the revocable license, and also in connection with the water used in carrying on the operations on section 23.

II.

Appeal by the Texas Company From the Judgment in Favor of Russell for $3,600

The Texas Company argues that the revocable license, which Russell offered to it in connection with its wrongful use of section 23, was never accepted, because the Company had no intention of accepting it. Appellant presents for our consideration numerous passages from the Restatement of Contracts and Williston on Contracts dealing with the necessity of the offeree's intent to accept where an ambiguous act is selected by the offeror to signify acceptance, or where silence and inaction can be considered an acceptance. None of these citations deal with the precise question that we are confronted with in this case. The question here is whether an offeree may vitiate a contract by a claim of lack of intention to accept an offer when he accepts and retains the benefits offered to him by the offeror, with a positive and affirmative proviso by the offeror that such acceptance of the benefits will, in and of itself, be deemed by the offeror to be an acceptance. To put the problem in homely terms, may an offeree accept all of the benefits of a contract and

then declare that he cannot be held liable for the burdens because he secretly had said, "King's Ex"? We think not. A rule with such effect would be unconscionable and is not in line with either fairness or justice. The correct rule, we believe, is found in § 72(2) of the Restatement of Contracts, wherein it is stated:

"Where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance. *If circumstances indicate that the exercise of dominion is tortious the offeror may at his option treat it as an acceptance, though the offeree manifests an intention not to accept.*" (Emphasis added.)

Russell's offer of the license in clear and unambiguous terms stated that the continued use of section 23 in connection with activities and operations on other lands would constitute an acceptance of the offer of the license. The trial court found on the evidence that The Texas Company did so continue to use section 23, and hence unequivocally came within the terms specified for acceptance. It is a well established principle of property law that the right to use the surface of land as an incident of the ownership of mineral rights in the land, does not carry with it the right to use the surface in aid of mining or drilling operations on other lands (See 36 Am. Jur., Mines and Minerals, § 177, § 180 and § 181; anno.: 48 A. L. R. 1406, 1407). That such use by The Texas Company was tortious admits of no doubt. But even in the absence of a tortious use, the true test would be whether or not the offeror was reasonably led to believe that the act of the offeree was an acceptance, and upon the facts of this case it seems evident that even this test is met.

Appellant urges that the holdings in the California cases of Wright v. County of Sonoma, 156 Cal. 475, 105 P. 409, and Sherman v. Associated Telephone Co., 100 Cal. App. 2d 806, 224 P. 2d 846, are determinative of this phase of this case. We do not find that either of these cases is in point. In each of these cases the notices sent by the plaintiff to the defendant were to the effect that defendant would be charged at a specified rate per day for his continued wrongful use of the plaintiff's property and contained no words of offer for a license, easement or sale. Hence, the notice was nothing more than an attempt to inflict a penalty by means of liquidated damages, and this the court refused to approve. In the case at bar no such situation existed, since Russell, as the offeror, in clear and unmistakable terms, offered a license to the appellant, and appellant by its own conduct accepted the offer. It is, therefore, obvious that the California cases cited are not applicable.

The conclusion reached by the trial court on this phase of the case was correct.

III.

Appeal by Russell on the Issue of the Value of His Surface Rights

On this issue the trial court refused to consider evidence which was designed to show the value of the use of the surface of the land in question for oil well drilling purposes, and instead based its judgment on a valuation fixed by the most profitable use to which Russell, himself, could have put the land. The trial court found this to be grazing.

Appellant, Russell, attempts to analogize to the general rule in condemnation cases where the proper valuation

of land is based on the most profitable use to which the land could be put, whether or not it is so put. But even in condemnation cases, the landowner can only recover for the value of the interest which he *owns*.[6] Since Russell does not own the mineral rights in section 23, it is obvious that he or his privies could not utilize its surface for mineral exploitation. Even if there were authority for Russell's contention in the field of condemnation awards, we are not at all impressed by the analogy. This case before us involves no condemnation. It involves only a use sanctioned by a contract to which Russell is a privy. Compensation for the use and occupancy of land is properly measured by the value that the owner could obtain from what he is able to offer on the market. Russell's predecessor in title never bargained for, and indeed, never received the right to offer section 23 on the market for mineral exploitation, so Russell can have no such right.

A case which seems to us to be very persuasive on this point is Southern Pacific Land Co. v. Meserve, 186 Cal. 157, 198 P. 1055. In that case plaintiff contended that he should be entitled to recover damages for the wrongful use of his desert land by the defendant measured by the rental value of the land with water on it. The facts showed that water in this area could only be obtained through stock ownership in the local water company. The defendant was a stockholder, but the plaintiff was not. The court concluded that the plaintiff's recovery must be limited to the rental value of the land alone, and

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[6]Continental Land Co. v. United States, 9 Cir., 1937, 88 F. 2d 104; Washington Water Power Co. v. United States, 9 Cir., 1943, 135 F. 2d 541.

not measured by the value of the land with an available source of water.

In 15 Am. Jur., Damages, § 131, it is stated:

"If the plaintiff's use of the property is restricted by contract, he can recover only on the basis of the loss of such restricted use."

The soundness and fairness of this principle are made patent by the rule itself, and to further discuss the point would be but to belabor the obvious.

The deed containing the mineral reservation, here involved, shows on its face that payment to compensate the surface owner for the interference with his use of the property would be based on a going market value. The trial court, from ample competent evidence, determined that section 23 was grazing land, and awarded Russell compensation accordingly. The facts so found by the trial court are binding upon us, McCaughn v. Real Estate Land Title & Trust Co., 297 U. S. 606, 56 S. Ct. 604, 80 L. Ed. 879; Inland Power & Light Co. v. Grieger, 9 Cir., 91 F. 2d 811, 112 A. L. R. 1075; Ocean Accident & Guarantee Corp. v. Penick & Ford, 8 Cir., 101 F. 2d 493; and United States v. Union Trust Co., of Indianapolis, 7 Cir., 90 F. 2d 702. This court will not employ a rule of damages which would have the effect of enlarging Russell's right in the property, and as a result we hold that the trial court was correct in limiting Russell's damages to the value of the land for grazing purposes.

IV.

Russell's Claim of Error in Awarding Damages for the Water Used by the Texas Company in Connection With Operations on Section 23

The trial court considered, but found itself unable to determine from the evidence, the amount of damage, if any, suffered by Russell as a result of the taking of water from section 23 for use on section 23. After carefully examining the record, we feel constrained to observe that the trial court reached the only conclusion that was logical and rational.

Even if the amount of damage was sufficiently presented by the evidence, there is abundant authority for the proposition that the owner of mineral rights is entitled to take from the land and use that amount of water which is reasonably necessary for the exploitation of the mineral rights, Stradley v. Magnolia Petroleum Co., Tex. Civ. App., 155 S. W. 2d 649, and cases cited therein. Russell is bound to recognize that this right in the surface is an incident of mineral ownership.

V.

Russell's Claim of Error in Not Awarding Him Damages for the Wrongful Use of Section 23 Prior to the Effective Date of the Revocable License

We have already set forth the trial court's findings on this issue. No duty, in fact no authority, rests with us to review a trial court's decision based on its view of the evidence unless a plain error of fact appears or there is a misapplication of a rule of law, Panama Mail S. S. Co. v. Vargas, 9 Cir., 33 F. 2d 894, and The Mabel, 9 Cir., 61 F. 2d 537. Where the result is rational and reasonable, the acceptance or rejection of testimony by

a trial judge is binding upon this Court, and what is thus done by the trial judge must not be disturbed by us, Metro-Goldwyn-Mayer Corporation v. Fear, 9 Cir., 104 F. 2d 892, and Larsen v. Portland California S. S. Co., 9 Cir., 66 F. 2d 320. A trial judge, having seen and heard the witness, is in an infinitely better position than we can be to determine what portion, if any, of a witness's testimony is to be believed. Often the conduct of the witness on the witness stand, and the manner in which he testifies, are more important than what the witness actually says, in determining his credibility. It, therefore, follows that we must not in this case substitute our judgment for that of the trial judge unless from the record we find that he was guilty of some manifest error.

We have carefully reviewed the record in this case with our duty, as it is above outlined, in mind. We find that the record does support the trial court's conclusions on this issue. It, therefore, follows that the trial court's disposition of these claims was proper.

The judgment is affirmed as to both appellants.

Judgment and Orders of the Court Below.

United States Court of Appeals for the Ninth Circuit.

Theodore B. Russell, Appellant, vs. The Texas Company, *et al.*, Appellees.

The Taxes Company, Appellant, vs. Theodore B. Russell, Appellee. No. 14983.

JUDGMENT.

Appeal from the United States District Court for the District of Montana.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of appellee, the Northern Pacific Railway Company and against appellant, Russell:

It Is Further Ordered and adjudged by this court that the said appellee recover against the said appellant for its costs herein expended and have execution therefor.

(Endorsed) Judgment Filed and Entered: November 24, 1956 PAUL P. O'BRIEN, Clerk.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, January 21, 1957.

Before: Stephens and Bone, Circuit Judges, and Halbert, District Judge.

ORDER DENYING PETITION FOR REHEARING.

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant Russell, filed December 21, 1956, and within time allowed therefor by rule of court for a rehearing of the above cause, be, and hereby is denied.

APPENDIX B.

Portions of the Granting Act of 1864.

(13 U. S. Stats. at L., Ch. 217, p. 365.)

CHAP. CCXVII—An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line From Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. * * *

"SEC. 2. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to said 'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water-stations; and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill.

"SEC. 3. *And be it further enacted.* That there be, and hereby is, granted to the 'Northern Pacific Railroad Com-

pany,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections; * * *

"SEC. 4. *And be it further enacted,* That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President

of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: *Provided,* That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: *Provided, also,* That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act.

"SEC. 5. *And be it further enacted,* That said Northern Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture, and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial

and approved description, to be operated along the entire line: * * *

"SEC. 6. *And be it further enacted,* That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.

"SEC. 8. *And be it further enacted,* That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July anno Domini eighteen hundred and seventy-six.

"SEC. 9. *And be it further enacted,* That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States, by its congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

"SEC. 10. *And be it further enacted,* That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States.

"* * *

"SEC. 20. *And be it further enacted,* That the better to accomplish the object of this act, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this Act."

Joint Resolution of May 31, 1870.

(16 U. S. Stats. at L., Res. 67, p. 378.)

"*Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled*, That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been

granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points: *Provided,* that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: *Provided Further,* That in the construction of the said railroad, American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

"Sec. 2. *And Be It Further Resolved,* That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company, and any other parties.

"APPROVED, May 31, 1870."

Extracts From the Act of June 25, 1929.

(46 U. S. Stats. at L., p. 41; 43 U. S. C. A. §921.)

Section 2 of the Act of 1929 provides, in part:

"That all of the unsatisfied indemnity selection rights, if any exist, claimed by the Northern Pacific Railroad Company . . . under and by virtue of the land grants contained in the Act of July 2, 1864, and resolution of May 31, 1870 . . . are hereby declared forfeited to the United States."

Section 3 of the Act of 1929 provides, in part:

". . . and the passage of this Act shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 31, 1870, relative to the disposition of granted lands by said grantee, and the right is hereby reserved to the United States to, at any time, enact further legislation relating thereto."

Section 5 of the Act of 1929 provides, in part:

"The Attorney General is hereby authorized and directed forthwith to institute and prosecute such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies, and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined, and a full accounting had between the United States and said companies, . . ."

Appendix C

Area within the State of Montana from which were drawn public lands in aid of the construction of the railroad and telegraph lines of Northern Pacific Railroad Company.

[MAP OF MONTANA]

Primary limits

First Indemnity limits

Second Indemnity limits

FILED
JUN 17 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1009

THEODORE B. RUSSELL,

Petitioner,

vs.

THE TEXAS COMPANY, a corporation, FREDERICK T. MANNING DRILLING COMPANY, a corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR NORTHERN PACIFIC RAILWAY COMPANY IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of Case	3
Argument	6
1. There Is No Important Question of Federal Law	6
2. The Decision Below, Based on Estoppel, Was Clearly Correct	13
Conclusion	16

CITATIONS

	Page
Cases:	
Northern Pacific v. DeLacey, 174 U. S. 622, 628	4, 9
Railway Company v. McShane, 22 Wall. 444	15
St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S. 1, 7	8, 11
Union Pacific R. Co. v. McShane, 24 Fed. Cas. 640	14
United States v. Northern Pacific Railroad Company, 152 U. S. 284, 294	4
United States v. Northern Pacific Railroad Co., 193 U. S. 1	4
United States v. Northern Pacific Railroad Company, 152 U. S. 284	9
United States v. Northern Pacific Railway Company, 311 U. S. 317, 337, 374	4, 5, 6
United States v. Union Pacific R. Co., decided April 8, 1957	16
Statutes:	
R. S. Sec. 2289, Mch. 3, 1891, c. 561; Sec. 5, 26 Stat. 1097; 43 U.S.C.A. Sec. 161	5

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OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals for the Ninth Circuit (Appendix "A" of Petition) is reported at 238 F. (2d) 636.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

(1) Whether the disposition by Northern Pacific Railway Company in 1909 of an odd-numbered section of land located in Dawson County, Montana, within the place limits of the land grant made to its predecessor by Section 3 of the Act of Congress of July 2, 1864 (13 Stats. 365), was in any manner governed or affected by the proviso contained in the Joint Resolution of May 31, 1870 (16 Stats. 378), that "all lands hereby granted to said Company, which shall not be sold or disposed of, or remain subject to the mortgage by this Act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said Company, not exceeding $2.50 per acre."

(2) If so, whether the settlement and preemption proviso prohibited sale of the land without the minerals so as to render null and void every attempted exception and reservation of minerals.

(3) If so, whether a purchaser from the Railway Company of more acreage than could be acquired by settlement and preemption under the public land laws is estopped by acceptance of the deed to deny the validity of an exception and reservation of minerals included therein.

STATUTES INVOLVED

The pertinent provisions of the granting act of July 2, 1864, and of the Joint Resolution of May 31, 1870, are set forth in Appendix "B" at pages 19 to 25 of the Petition.

STATEMENT OF CASE

Petitioner brought this action December 8, 1952, in the United States District Court for the District of Montana to quiet title to Section 23, Township 17N., Range 53E., M.P.M., in Dawson County, Montana, and to have the exception and reservation by Northern Pacific Railway Company of the minerals in the section, and an oil and gas lease granted by the Railway Company to The Texas Company adjudged null and void. The section of land in question is an odd-numbered section, classified as non-mineral, located in the place limits of the land grant made by Sec. 3 of the Act of Congress of July 2, 1864, to aid in the construction of the Northern Pacific railroad, and was patented to defendant Northern Pacific Railway Company on June 24, 1902. Petitioner's title to the premises was acquired under special warranty deed dated July 14, 1944, and stems from a warranty deed executed and delivered on June 14, 1918, by defendant Northern Pacific Railway Company to one Millard Stubrud, assignee of one MaBelle Cobb, to whom the Railway Company had given a contract for deed dated November 30, 1909, agreeing to sell and convey to her the surface of the land with an exception and reservation of minerals. The deed to Stubrud, in accordance with the contract for deed, expressly excepted and reserved unto the Railway Company, its successors and assigns "all minerals of any nature whatsoever, including coal, iron, natural gas and oil upon or in

said land, together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same." This deed was duly recorded in Dawson County on June 26, 1918, and petitioner purchased the premises with notice thereof.

The sole ground upon which petitioner claims title to the minerals in the premises is that the settlement and pre-emption proviso contained in the Joint Resolution of May 31, 1870, precluded the Railway Company from excepting and reserving the minerals in this section of land, and rendered null and void its attempt to do so. The language of the Joint Resolution, however, clearly makes the settlement and pre-emption proviso applicable only to "lands hereby granted," and, as has been repeatedly held by this Court, the only lands granted by the Joint Resolution were lands on each side of the new line authorized from Portland, Oregon to Tacoma, Washington on Puget Sound. *United States* v. *Northern Pacific Railroad Company,* 152 U. S. 284, 294; *Northern Pacific* v. *DeLacey,* 174 U. S. 622, 628; *United States* v. *Northern Pacific Railroad Co.,* 193 U. S. 1; *United States* v. *Northern Pacific Railway Company,* 311 U. S. 317, 337, 374. None of the lands granted in aid of the Portland-Tacoma line are in Montana.

The District Court granted the Railway Company's motion for summary judgment upholding the validity of its mineral reservations, and the Court of Appeals for the Ninth Circuit affirmed. District Judge Murray, who heard the case, felt that *United States* v. *Northern Pacific Railway Company,* 311 U. S. 317, was determinative of the issue. The Court of Appeals held that petitioner was estopped from asserting that the mineral rights passed to Stubrud under the Railway Company's deed, since they were expressly excepted and

reserved by the terms thereof and petitioner claimed title through that deed and asserted no independent source of title. It said, however: "Even if we felt constrained to recognize the right of Russell to raise the question of the validity of the mineral reservation by virtue of the two granting acts, we are convinced that the holding in *U. S.* v. *N. P. Ry. Co.*, 1940, 311 U. S. 317, 61 S. Ct. 264, 85 L. Ed. 210, is determinative [illegible]."

While petitioner asserts (Petition, p. 11) that MaBelle Cobb, to whom the Railway Company contracted to sell the surface of section 23 in 1909, was "an actual settler," there is nothing to substantiate that assertion other than a provision in the contract that the purchaser would cultivate at least one-tenth of the tillable portion of the premises each year until three-tenths of all tillable land shall have been broken and put under cultivation. Moreover, the contract covered 640 acres of land, which could not be acquired by "settlement and pre-emption like all other lands" because the homestead laws limited settlers to one quarter section of unappropriated public lands, and provided that "No person who is the proprietor of more than 160 acres of land in any state or territory shall acquire any right under the homestead law" (R. S. Sec. 2289; Mch. 3, 1891, c. 561; Sec. 5, 26 Stat. 1097; 43 U.S.C.A., Sec. 161).

ARGUMENT

No reasons whatever exist for a review of the decision below by this Court. The question whether the settlement and preemption proviso of the Joint Resolution applies to any lands other than those in aid of construction of the Portland-Tacoma line has been so explicitly decided by this Court in the recent litigation between the Government and the Railway Company as to foreclose further argument on the subject and leave no substantial federal question to be decided.

1. There Is No Important Question of Federal Law.

One of the points explicitly decided by this Court in *United States* v. *Northern Pacific Railway Company*, 311 U. S. 317, was that the proviso of the Joint Resolution of May 31, 1870, requiring that granted lands be opened by the Company to settlement and preemption, applied only to the additional lands granted by that resolution opposite the Northern Pacific line from Portland, Oregon to Tacoma, Washington, and did not apply to lands granted by the original act of July 2, 1864. The contention of the United States in that case, as set forth on page 193 of its brief in this Court in Nos. 476 and 477, October Term, 1939, was that "the lands subject to the proviso were all the lands of the grant from Lake Superior to Puget Sound, and the same lands which might be subjected to the one 'mortgage by this Act authorized.'" This Court said (311 U. S. 317 at page 368):

> "We hold, contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring that the lands be opened by the company to settlement

and pre-emption, applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864."

It added a footnote that

"The legislative history is convincing: see Cong. Globe, 41st Cong., 2d Sess., pp. 2480-85; 2569-84."

What the Court meant by "the additional lands granted by that Resolution" is elsewhere in the Court's opinion made clear. At page 326, the Court said of the Joint Resolution:

"It further authorized the location and construction of the main railroad via the valley of the Columbia River to Puget Sound and of a branch from the main line across the Cascade Mountains to Puget Sound, and made a grant of land in connection with the construction authorized between Portland and Puget Sound, on the same terms as the original grant."

On page 337, it said:

"An additional line was authorized by the Joint Resolution of 1870 and a land grant made therefor."

On page 374, the Court said:

"The Resolution made a new grant in aid of the Portland-Tacoma line."

The Court's understanding that all lands other than those in aid of the Portland-Tacoma line were "lands acquired under the grant of 1864," to which it held the proviso of the Resolution of 1870 inapplicable, is made clear by the Court's discussion of the Company's claim to indemnity resulting from the Tacoma overlap. The Court said (p. 374):

"The Company says that, under the 1864 grant pursuant to which the Cascade line was built, title to the place lands vested in the company on the date of definite

location, as of the date of the original grant; that these lands were thus lost to the grant of 1870 appurtenant to the Portland-Tacoma line; and that, the company was entitled to indemnity for them."

It then stated the question as follows: "Whether Congress intended, in connection with its later grant of 1870, to accord the company indemnity for failure to receive, in aid of the Portland-Tacoma line, lands to which it would get title in virtue of its definite location of the Cascade line, is the question." If the Court had considered the lands opposite the Cascade line as not acquired under the 1864 grant, no problem would have been presented.

Prior decisions of this Court have clearly shown that no lands were granted by the Joint Resolution of 1870, except those in aid of the Portland-Tacoma line (the provision for a second indemnity belt not constituting a present grant of lands).

In *St. Paul and Pacific Railroad Company* v. *Northern Pacific Railroad Company*, 139 U. S. 1, the Court held that Northern Pacific Railroad Company took title under its 1864 grant to certain lands within the place limits of its grant opposite a portion of its line in the State of Minnesota which was definitely located November 24, 1871, and that the St. Paul and Pacific could not acquire those lands under the additional grant in aid of its line made by the Act of March 3, 1865, because "the rule has long been settled that where different grants cover the same premises the earlier takes the title." If, as contended by petitioner, the Company's right to lands included in the 1864 grant depended upon a re-grant made by the Joint Resolution of 1870, the case was erroneously decided.

In *United States* v. *Northern Pacific Railroad Company*, 152 U. S. 284, this Court held that the Joint Resolution "should be regarded as giving a subsidy of lands in aid of the construction of a *new* road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound."

In *Northern Pacific Railway Company* v. *DeLacey*, 174 U. S. 622, the land in controversy was within the primary limits of the land grant, both of the Portland-Tacoma line as definitely located, and the Cascade Branch, as definitely located across the Cascade Mountains to Puget Sound. The Court held that the Company acquired title to the land under the 1864 Act. It said (p. 628):

> "The defendant contends that the land in controversy was excluded by operation of law from the grant of 1864 by the resolution of May 31, 1870. Herein he assumes that the effect of that resolution was to blot out the grant under the act of 1864. The resolution did not have that effect. It was not an amendment to the third section of the act of 1864 which granted the lands."

When this Court said that the proviso of the Joint Resolution applied only to the additional lands granted by that Resolution "and not to lands acquired under the grant of 1864" it certainly did not mean, as petitioner argues, that the proviso was inapplicable only to lands earned by construction prior to May 31, 1870, for it knew that construction did not begin until February 15, 1870, and that there were no lands so earned and certified to the Company on May 31, 1870.

In asking this Court to re-examine the question thus explicitly decided by this Court as to the applicability of the settlement and preemption proviso of the Joint Resolution, petitioner advances three reasons:

(1) "That the decision of the court below lies athwart the congressional intent that public lands and their values granted solely in aid of railroad construction find their ultimate unencumbered disposition to the public at the stipulated maximum return of $2.50 per acre to Northern Pacific."

(2) That the 1940 opinion of this Court leaves the question undecided.

(3) That the doctrine of estoppel upon which the case was decided below is without application where the origin of title is Congressional Act.

It will at once be apparent that the first and third reasons relied upon are no reasons at all, for they assume the proviso of the Joint Resolution to be applicable to the premises in question, contrary to the 1940 decision of this Court. So far as congressional intent is concerned, the legislative history of the Joint Resolution leaves no doubt that it was the intent of Congress to confine the settlement and preemption proviso to the additional lands granted in aid of the construction of the Portland-Tacoma line. Hence the decision below cannot possibly thwart any congressional intent. And since the proviso of the Joint Resolution has been held by this Court inapplicable to lands acquired under the 1864 Act, petitioner cannot avoid the rule of estoppel on the ground that the origin of his title is a congressional act. As for the assertion that the 1940 opinion of this Court in *United States* v. *Northern Pacific Railway Company* serves to support this petition, it is demonstrably erroneous.

The arguments advanced by petitioner in support of his contention that the settlement and preemption proviso of the Resolution necessarily must apply to the entire grant of lands in aid of construction of the Northern Pacific furnish no reason for re-examination of the question by this Court. The Joint Resolution added nothing to the estate in the lands granted by the 1864 Act and was in no sense a re-grant of those lands. The estate granted by Sec. 3 of the 1864 Act was certainly not made less than a fee by the provision in Sec. 10 that "No mortgage or construction bonds shall ever be issued *by said Company* on said road or mortgage or lien made in any way except by the consent of the Congress of the United States" (italics ours), for the Company could sell and convey to any purchaser a fee title to granted lands, free of any restriction on the subsequent disposition thereof. Of course, as stated in *St. Paul and Pacific* v. *Northern Pacific*, 139 U. S. 1, 7, prior to construction of the railroad opposite the lands the Company could not so dispose of granted lands as to deprive the United States of the right to compel their application to the purposes of the grant or so as to prevent their forfeiture in case of the Company's failure to comply with its conditions. But it certainly is not correct to say that the Act of 1864 restrained alienation until patent issued. In any event, the Joint Resolution did not change the situation in this respect.

In the face of the clear evidence of congressional intent to be found in the legislative history of the Joint Resolution, there is certainly no point in endeavoring to ferret out a different intent from the language of the Resolution itself. And, of course, the provision in Sec. 3 of the Act of 1929 that "the passage of this Act shall not be construed as in any wise evidencing the purpose or intention of Congress to depart

from the policy of the United States expressed in the Resolution of May 31, 1870, relative to the disposition of granted land by said grantee," does not purport to determine or influence decision as to the application of the settlement and preemption proviso.

The assertion that "the opinion of this Court in United States v. Northern Pacific R. Co., brought pursuant to congressional act, serves to support this petition," is based on a misunderstanding of the court's decision, and attempts to put the court in the position of having made a decision which was precisely the opposite of that which it seemed to make. As above pointed out, the Court did definitely hold that the proviso "applies only to the additional lands granted by that resolution and not to lands acquired under the grant of 1864." The only point upon which it reserved decision was whether the Company's breach of the proviso by refusal to open lands subject thereto to settlement and preemption, together with other breaches of covenant claimed by the Government, had been so substantial as to disentitle it to call for further performance by the United States, or to recover any money compensation for abrogation of its selection rights. The statement on page 24 of the Petition that "the Court reserved the question as to whether the *proviso* applied to every part of the granted lands on the issue of forfeiture of right to further awards of lands" is clearly incorrect, for the Court expressly held the proviso applicable only to "the additional lands granted by that resolution."

The Petition thus advances no substantial reason for doubting the correctness of the construction placed on the proviso by this Court in its 1940 decision or the controlling effect of that decision upon this litigation.

2. The Decision Below, Based on Estoppel, Was Clearly Correct.

The decision of the Court of Appeals was based primarily on the ground that petitioner, under the undisputed facts, was estopped to question the validity of the title of respondent Railway Company to the severed mineral fee in the premises, a decision with respect to the application of local law. Petitioner concedes that the rule of estoppel applied by the court below governs purely private conveyances and quiet title actions. He contends, however, that "this is not a case of private grant, but a reliance upon Congressional Act continually re-expressed, as the origin of a full title which renders the mineral reservation contrary thereto void," and he asserts that "the rules of estoppel in private conveyances have no application to this case." This position, of course, collapses, if, as this Court has held, the proviso of the Joint Resolution which he relies upon is not applicable to the lands in question. But, even if the proviso of the Joint Resolution be assumed to be applicable, the decision of the court below was clearly correct, whether or not the principle asserted by petitioner would be applicable in some other case, because the purchaser from the Railway Company of an entire section of land certainly cannot claim any rights under an act of Congress subjecting its lands to settlement and preemption "like all other lands" when the public land laws limit settlers to one quarter section of land, and provide that no person who is the proprietor of more than 160 acres of land in any state or territory shall acquire any right under the homestead law.

Nothing contained in the settlement and preemption proviso purports to prevent the Company from selling lands to

persons who may wish to acquire more lands than may be obtained by settlement or preemption, or who may not wish to preempt or occupy them. Certainly, if private individuals may claim any rights under the settlement and preemption proviso, such individuals must possess the qualifications of a preemptor, and must settle upon no more than a quarter section of land and must obtain such land as a preemptor may obtain other public lands.

The rights of a land grant railroad with respect to granted lands that are subject to such a settlement and preemption provision as is contained in the Joint Resolution of May 31, 1870, were carefully considered by Circuit Judge Dillon in Union Pacific R. Co. v. McShane, 24 Fed. Cas. 640. Section 3 of the Act of July 1, 1862, granting lands to the Union Pacific, concluded with a proviso that "all such lands so granted by this section which shall not be sold or disposed of by the Company within three years after the entire road shall be completed, shall be subject to settlement and pre-emption like other lands at a price not exceeding $1.25 per acre to be paid to the Company." Judge Dillon held that lands subject to settlement and preemption under that provision were not exempt from state taxation on account thereof. He said:

> "During the three years the right of the company to sell at its own price is clear, and has not been denied. After the three years the title does not change. The company still owns the lands, but 'subject' to the right of any person possessing the qualifications of a pre-emptor, to settle upon them and obtain them as a pre-emptor may obtain other public lands. But this right does not prevent the company from selling lands in good faith to persons who may not wish to pre-empt or occupy them. The rights intended to be given to the public are secured

and the evils apprehended from the company having a monopoly of such a vast amount of lands, are avoided by this construction — which recognizes the right of the actual settler to pre-empt the lands, and thus destroy the monopoly, and also the right of the company actually and in good faith, to sell any tract not at the time pre-empted, and which, if sold, likewise destroys to that extent the monopoly, since a sale of lands is usually the first step towards their settlement and cultivation."

This case was affirmed by this Court on appeal. *Railway Company* v. *McShane,* 22 Wall. 444. The Court refrained from deciding the question whether anyone having the proper qualifications had the right to settle on the lands in question and, upon tendering to the Company the $1.25 per acre price, to enforce his demand for title. The Court said:

"It is not known that any such attempt has been made, or ever will be, or that Congress or the department has taken, or intends to take, any steps to invite or aid the exercise of this right. It would seem that if it exists, it would not be defeated by the issue of the patent to the company, and it may, therefore, remain the undefined and uncertain right, vested in no particular person or persons, which it now is, for an indefinite period of time. The company, meantime, obtains the title, sells the lands when a good offer is made, and exercises all the other acts of full ownership over them, without the liability to pay taxes.

"We are of opinion, therefore, that this right confers no exemption from taxation, whether the land be patented or not;".

No individual could have compelled the Railway Company to sell to him, as a settler or preemptor entitled thereto under the proviso of the Joint Resolution of 1870, an entire section of land. To obtain more than a quarter section from the

Company he would be obliged to negotiate the purchase. After negotiating such a purchase and obtaining a deed from the Company he should certainly be estopped by his contract to assert the invalidity of an exception and reservation contained in the deed of any portion of the premises excluded from the sale by the agreed terms thereof. And any subsequent purchaser of his interest, obliged to claim title under that deed, should certainly be subject to the same rules of estoppel that apply to other purchasers of land.

CONCLUSION

The question which petitioner asks this Court to review has been expressly and explicitly decided by this Court in litigation between respondent Northern Pacific Railway Company and the United States of America, the parties directly concerned. No sound reason has been advanced by petitioner for doubting the correctness of this Court's decision of that question, based as it was upon the evidence of congressional intent afforded by the legislative history, which this Court found "convincing." Both courts below found this Court's decision of the question determinative of the case and the Court of Appeals found an additional and non-federal ground for rejecting petitioner's claim to the mineral estate. The petition for a writ of certiorari should accordingly be denied.

We cannot, however, refrain from commenting on petitioner's concluding suggestion that the decision of this Court on April 8, 1957, in *United States* v. *Union Pacific R. Co.* holding that the grant of right-of-way to that Company did not include the underlying minerals, supports the granting of this petition on the theory that, by over-

ruling prior decisions, land grant railroads can be stripped of the minerals discovered years after in granted lands classified as non-mineral and some supposed congressional intent effectuated. So far as the settlement and preemption proviso is concerned, the manifest congressional intent was to secure the speedy settlement of the country and could not have been frustrated or impeded by sales of land to settlers with exception and reservation of minerals, especially when the lands were not believed to contain minerals, other than coal and iron, which Congress expressly intended the Railway Company to have, and the lands had been classified as non-mineral. So far as minerals subsequently discovered on lands classified as non-mineral are concerned, congressional intent is not discoverable. But it is not apparent how any congressional policy with respect to settlers on the public domain or on lands granted to railroads can now be effectuated, seventy years after the completion of the railroad, by depriving the Railway Company of its reserved ownership of minerals in land grant lands for the benefit, not of the public generally, but of land speculators and other subsequent purchasers of those lands. On the other hand, income received by the Railway Company from such mineral resources furnishes it with funds sorely needed and actually used for additions, betterments and improvements to its railroad, which benefit the public it serves and effectuates the purpose for which the lands were granted.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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